92-573

Supreme Court, U.S.
FILED
JUL 6 1992
OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

JACK W. CONAWAY, PETITIONER,

v.

CONTROL DATA CORPORATION, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Requesting review of the judgment entered
under Cause No. 91-2695
in the United States Court of Appeals for the Fifth Circuit,
appealed from the United States District Court
for the Southern District of Texas.

Penny P. Bell
5847 San Felipe, Suite 4295
Houston, Texas 77057
(713) 869-4388
Counsel for Petitioner

606

QUESTIONS PRESENTED FOR REVIEW

1. Where the Supreme Court of Texas has recognized a cause of action for negligent infliction of emotional distress, may the Court of Appeals for the Fifth Circuit disregard Erie v. Tompkins and the Rules of Decision Act by refusing to apply the cause of action to an employment context?

2. Has the Court of Appeals for the Fifth Circuit denied petitioner his right to trial by jury under the Seventh Amendment to the U.S. Constitution by refusing to recognize petitioner's cause of action for negligent infliction of emotional distress in an employment context?

TO THE HONORABLE UNITED STATES SUPREME COURT:

Petitioner, Jack W. Conaway, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on March 10, 1992.

PARTIES

The parties to the lawsuit are Jack W. Conaway, petitioner herein and plaintiff below, and Control Data Corporation, respondent herein and defendant below.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

PARTIES ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW x

JURISDICTION x

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED xi

STATEMENT OF THE CASE 1

REASONS FOR GRANTING CERTIORARI 5

APPENDIX 26

TABLE OF AUTHORITIES

Constitutional Provisions and Statutes:

U.S.C.A. Const. Amend. VII (West 1987) 19, 22

Age Discrimination in Employment Act,
29 U.S.C. 623 (West 1985) 1, 28

Federal Rule of Civil Procedure 73 (West Supp. 1992) ... 1, 3

Rules of Decision Act, 28 U.S.C.A. 1652 (West 1966) . 5, 7, 24

28 U.S.C. 1331 (West Supp. 1992) 1

28 U.S.C. 636(c) (West Supp. 1992) 1, 3

United States Supreme Court Cases:

City of Manchester v. Ericsson,
105 U.S. 347 (1882). 20

Cohen v. Beneficial Industrial Loan Corp.,
337 U.S. 541 (1949) 7

Commissioner of Internal Revenue Service v. Stern,
357 U.S. 39 (1958) 6

Erie R. Co. v. Tompkins,
304 U.S. 64 (1938) 5, 6, 7, 9, 24

Hanna v. Plumer,
380 U.S. 460 (1965) 6

United Gas Pipe Line Co. v. Ideal Cement Co.,
369 U.S. 134 (1962). 7, 18

United Mine Workers v. Gibbs,
383 U.S. 715 (1966). 6

West v. American Tel. & Tel. Co.,
311 U.S. 179 (1940). 7, 8

Wilkerson v. McCarthy,
336 U.S. 53 (1949) 20, 21

Lower Federal Court Cases:

Boeing v. Shipman,
411 F.2d 365 (5th Cir. 1969) 3

Campbell v. Maine Central Transportation Co.,
20 F.R.D. 629 (S.D.Maine 1957). 9

Dean v. Ford Motor Credit Co.,
885 F.2d 300 (5th Cir. 1989) 12

Glazer v. Glazer,
374 F.2d 390 (5th Cir. 1967),
cert. denied, 389 U.S. 831 (1967), ... 3

Granberry v. O'Barr,
866 F.2d 112 (5th Cir. 1988). 20

Hayes v. United States,
899 F.2d 438 (5th Cir. 1990). 10, 15

Henson v. Falls,
912 F.2d 977 (8th Cir. 1990). 23

Kelly v. Schlumberger Technology Corp.,
849 F.2d 41 (1st Cir. 1988) 16

Ladue v. Chevron, U.S.A., Inc.,
920 F.2d 272 (5th Cir. 1991). 8

Lubin v. American Packaging Corp.,
760 F.Supp. 450 (E.D. Pa. 1991). 22

Marshall v. Nelson Electric, a Unit of General Signal,
766 F. Supp. 1018 (N.D. Okla. 1991) 22

Martin v. Texaco, Inc.,
726 F.2d 207 (5th Cir. 1984). 14

Miller v. Fairchild Industries, Inc.,
885 F.2d 498 (9th Cir. 1989),
cert. denied, 110 S.Ct. 1524 (1990) 21

Moody v. Pepsi-Cola Metropolitan Bottling Co., Inc.,
915 F.2d 201 (6th Cir. 1990), ... 17

Polk County, Georgia v. Lincoln National Life Ins. Co.,
262 F.2d 486 (5th Cir. 1959). 12

Robak v. United States,
658 F.2d 471 (7th Cir. 1981). 8

Scofield v. Bethea,
170 F.2d 934 (5th Cir. 1948),
cert. denied, 336 U.S. 944 (1949). 6

Stewart v. Sixth Ave. R. Co.,
45 F. 21 (S.D.N.Y. 1891). 20

United States v. Smoot Sand & Gravel Corp.,
248 F.2d 822 (4th Cir. 1957). 9

Vancouver Book & Stationery Co. v. L. C. Smith & Corona Typewriters, 138 F.2d 635
(9th Cir. 1943), cert. denied, 321 U.S. 786 (1944). . . . 7

Williams v. Borden, Inc.,
637 F.2d 731 (10th Cir. 1980). 8

State Cases:

Alcorn v. Anbro Engineering, Inc.,
86 Cal. Rptr. 88; 468 P. 2d 216 (1970). 17

Boyles v. Kerr,
806 S.W.2d 255 (Tex. App. - Texarkana
1991, writ granted). 14

Burk Royalty Co. v. Walls,
616 S.W.2d 911 (Tex. 1981). 14

Bushell v. Dean,
781 S.W.2d 652 (Tex. App. - Austin 1989),
after remand, 820 S.W.2d 869 (1991) 12

Chappetta v. Bowman Transportation, Inc.,
415 So. 2d 1019 (La. App. 1982), ... 16

City of Ingleside v. Kneuper,
768 S.W.2d 451 (Tex. App. - Austin 1989, writ denied 11

Guardian Trust Co. v. Bauereisen,
121 S.W.2d 579, 132 Tex. 396 (1938). 14

Havens v. Tomball Community Hospital,
793 S.W.2d 690 (Tex. App. -
Houston [1st Dist.] 1990, no writ) 12

Hill v. Kimball,
76 Tex. 210, 13 S.W. 59 (1890). 9

Massey v. Massey,
807 S.W.2d 391 (Tex. App. - Houston
[1st Dist.] 1991, no writ) 11

Montgomery Ward v. Scharrenbeck,
204 S.W.2d 508 (Tex. 1947). 13

Osuna v. Southern Pacific R.R.,
641 S.W.2d 229 (Tex. 1982); 15

Otis Engineering Corp. v. Clark,
668 S.W.2d 307 (Tex. 1983). 15

Reagan v. Vaughn,
804 S.W.2d 463 (Tex. 1990) 11

Seay v. Travelers Indemnity Co.,
730 S.W.2d 774 (Tex. App. - Dallas 1987, no writ). . 15

Service Lloyds Ins. Co. v. Greenhallgh,
771 S.W.2d 688 (Tex. App. - Austin 1989, no writ) . . 12

St. Elizabeth Hospital v. Garrard,
730 S.W.2d 649 (Tex. 1987). 10

Vaughn v. Ag Processing, Inc.,
459 N.W.2d 627 (Iowa 1990). 22

Wilson v. Ferguson,
747 S.W.2d 499 (Tex. App. - Tyler 1988, writ denied). 13

Wright v. Gifford-Hill & Co., Inc.,
736 S.W.2d 828 (Tex. App. - Waco
1987, writ ref'd n.r.e.), ... 14

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit Court of Appeals is reported at 955 F.2d 358. That opinion is reproduced in the appendix hereto on page 28. The unpublished memorandum opinion of the Magistrate Judge for the United States District Court for the Southern District of Texas was entered on May 24, 1991. That opinion is reproduced in the appendix hereto on page 47.

JURISDICTION

The judgment sought to be reviewed was entered on March 10, 1992. Petitioner filed a timely petition for rehearing, which was denied on April 6, 1992. This court has jurisdiction to review the circuit court's judgment by writ of certiorari under 28 U.S.C.A. 1254(1) and Article III, Section 2, Clause 2, of the United States Constitution, following judgment of the Court of Appeals for the Fifth Circuit in Cause No. 91-2695, Jack W. Conaway v. Control Data Corporation.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment VII: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law."

Rules of Decision Act, 28 U.S.C.A. 1652 (West 1966) provides: "The laws of the several states ... shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. "

STATEMENT OF THE CASE

Petitioner, Jack W. Conaway, was terminated from employment by Control Data Corporation, effective November 14, 1986, at the age of 51, after almost 23 years of service to the company. He brought suit against Control Data Corporation for age discrimination under 29 U.S.C. 623, breach of employment contract, and intentional and negligent infliction of emotional distress. Suit was filed under Cause No. H-88-3373 in the United States District Court for the Southern District of Texas, styled Jack W. Conaway v. Control Data Corporation. Federal question jurisdiction under 28 U.S.C. 1331 was invoked since the age discrimination claim constitutes a matter in controversy arising under the laws of the United States.

The trial court denied summary judgment for Control Data Corporation except as to Conaway's intentional infliction of emotional distress claim. The parties consented to jury trial before a magistrate judge, as authorized by 28 U.S.C. 636(c) and Rule

73(a) of the Federal Rules of Civil Procedure.

Following trial to a jury and directed verdict on the age discrimination and breach of contract causes of action, the negligent infliction of emotional distress claim was submitted to the jury. The jury returned a verdict in favor of Conaway, finding Control Data Corporation negligently and grossly negligently inflicted severe emotional distress upon Conaway and awarding him damages of $50,000. On May 24, 1991, the magistrate judge granted Control Data Corporation's motion for judgment notwithstanding the verdict and awarded Conaway nothing. By her memorandum opinion, the magistrate judge found Conaway's claim for negligent infliction of emotional distress was based solely upon his termination and "is not a recognized separate cause of action in Texas." Accordingly, judgment was entered that the jury findings favoring Conaway be set aside and Conaway take nothing.

Conaway appealed to the Fifth Circuit Court of Appeals,

under the authority of 28 U.S.C. 636(c)(3) and Federal Rule of Civil Procedure 73(c), which permit direct appeal from rulings of magistrate judges. With regard to the setting aside of the jury's verdict, Conaway described to the Circuit Court the substantial evidence supporting the verdict and showing several years of mental torture at the hands of Control Data Corporation. Conaway requested that the Circuit Court reverse and render judgment on the jury's verdict, citing Glazer v. Glazer, 374 F.2d 390, 400 (5th Cir. 1967), cert. denied, 389 U.S. 831 (1967), and Boeing v. Shipman, 411 F.2d 365, 372 (5th Cir. 1969)(en banc). The Circuit Court did not review the evidence, but instead found that, even though Texas does recognize the tort of negligent infliction of emotional distress without requiring any physical injury, "the Texas Supreme Court does not yet recognize a separate cause of action in the employee/employer relationship for negligent infliction of emotional distress." As authority for that conclusion, the Circuit Court cited three federal district court opinions, none of which rely

on Texas law to justify excluding employees from the scope of the cause of action. Nevertheless, the Circuit Court ruled that the district court did not err in granting judgment notwithstanding the verdict in favor of Control Data Corporation. This petition responds to that ruling.

REASONS FOR GRANTING CERTIORARI

The Court of Appeals for the Fifth Circuit, by affirming the district court's judgment notwithstanding the jury verdict in favor of Conaway, has so far departed from the accepted and usual course of judicial proceedings as to call for exercise of this Court's power of supervision. Texas law does allow recovery for negligent infliction of emotional distress, and Texas has not excluded employees from the remedy. Other circuit courts have allowed employees recovery of mental distress damages in employment cases. The Circuit Court's ruling violates the principle of Erie v. Tompkins and the federal Rules of Decision Act. The Circuit Court's ruling further sanctions the district court's denial of Conaway's right to trial by jury under the Seventh Amendment to the U. S. Constitution.

I.

Where the Supreme Court of Texas has recognized a cause of action for negligent infliction of emotional distress,

may the Court of Appeals for the Fifth Circuit disregard Erie v. Tompkins and the Rules of Decision Act by refusing to apply the cause of action to an employment context?

Conaway's claim for negligent infliction of emotional distress is a "pendent jurisdiction" state law cause of action in that his state and federal claims derive from a common nucleus of operative fact; thus, the entire action was before the district court under Article III of United States Constitution. United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966). It has long been the law that a federal court must apply state law in determining a state question. See Commissioner of Internal Revenue Service v. Stem, 357 U.S. 39, 45 (1958), citing Erie R. Co. v. Tompkins, 304 U.S. 64 (1938); Scofield v. Bethea, 170 F.2d 934, 935 (5th Cir. 1948), cert. denied, 336 U.S. 944 (1949). The Erie v. Tompkins rule is rooted in part in a realization that it would be unfair for the character or result of litigation materially to differ because the suit had been brought in a federal court. Hanna v. Plumer, 380 U.S.

460, 467 (1965).

Where a state law is not covered by a state statute, a federal court may not determine the question independently, but must determine it as the state courts would and must follow the state court decisions. United Gas Pipe Line Co. v. Ideal Cement Co., 369 U.S. 134, 135 (1962)(per curiam). The federal court has the duty to ascertain what the state law is from all the available data. West v. American Tel. & Tel. Co., Ohio, 311 U.S. 179, 183 (1940). Under the Rules of Decision Act, 28 U.S.C.A. 1652 (West 1966), the term "laws" includes the unwritten law of a state as pronounced by its courts. Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 555 (1949), citing Erie v. Tompkins, 304 U.S. 64 (1938). More specifically, in a tort action in federal court, the law of the state in which the alleged tort was committed is determinative both of the existence of a legal duty and the character and measure of damages recoverable. Vancouver Book & Stationery Co. v. L. C. Smith & Corona Typewriters, 138 F.2d

635, 637 (9th Cir. 1943), cert. denied, 321 U.S. 786 (1944). In the absence of any direct precedent from the state involved, the federal court applying state law should consider decisions of sister states on the same issue. Robak v. United States, 658 F.2d 471, 475 (7th Cir. 1981). See also Williams v. Borden, Inc., 637 F.2d 731, 735 (10th Cir. 1980).

The Supreme Court of Texas Has Recognized the Independent Tort of Negligent Infliction of Emotional Distress.

The highest judicial authority and expositor of what is the law of Texas is the Supreme Court of Texas. See West v. American Tel. & Tel. Co., 311 U.S. 179, 183 (1940). When adjudicating claims for which state law provides the rules of decision, the Court of Appeals is bound to apply the law as interpreted by the state's highest court. Ladue v. Chevron, U.S.A., Inc., 920 F.2d 272, 274 (5th Cir. 1991). When the state's court of last resort has yet to speak on an issue, the court's task is to determine, to the best of its ability, how that court would rule if the

issue were before it. Id. In applying the rule of Erie v. Tompkins, it is not the function of the district court to draw fine distinctions not suggested in a state court opinion. Campbell v. Maine Central Transportation Co., 20 F.R.D. 629, 630 (S.D.Maine 1957). Nor is the application of state law dependent on the view of the federal court as to the policy, wisdom, justice, or fairness of the state law. See, i.e., United States v. Smoot Sand & Gravel Corp., 248 F.2d 822, 828 (4th Cir. 1957).

Texas has recognized a cause of action for negligent infliction of emotional distress without imposition of arbitrary restrictions; thus, the tort applies in employment circumstances. Respondent offered no authority to support the proposition that the federal court should or even could create such an exception to the clear and unambiguous rule of law declared by the Supreme Court of Texas. The tort has been recognized in Texas for a hundred years. See Hill v. Kimball, 76 Tex. 210, 13 S.W. 59 (1890). More recently, the Supreme Court of Texas has expressly recognized

the tort of negligent infliction of emotional distress without the imposition of arbitrary restrictions on recovery in such actions. St. Elizabeth Hospital v. Gerrard, 730 S.W.2d 649, 654 (Tex. 1987). That Court noted that "freedom from severe emotional distress is an interest which the law should serve to protect." Id. at 653. The cause of action is analyzed in the same manner as a traditional negligence cause of action, utilizing the reasonable prudent person standard. Id. at 652. Recovery does not depend upon proof of any intentional or willful act, gross negligence, breach of contract, physical injury or any conduct worse than negligence. See St. Elizabeth, 730 S.W.2d at 651, n. 1. In Texas, to prevail upon a negligence claim, the plaintiff must prove the essential elements of negligence: duty of reasonable care, breach of that duty, and damages resulting from the breach. Hayes v. United States, 899 F.2d 438, 443 (5th Cir. 1990).

The Supreme Court of Texas Would Have Reached a Result Favoring Petitioner on His Cause of Action for Negligent Infliction of Emotional Distress.

Several reasons support the reasonable conclusion that the Supreme Court of Texas would have reversed the trial court's judgment n.o.v. and rendered judgment for Conaway on his cause of action for negligent infliction of emotional distress:

(1) The Supreme Court of Texas has held a child's claim for negligent infliction of mental anguish is "separate and distinct" from a child's claim for loss of parental consortium. Reagan v. Vaughn, 804 S.W.2d 463, 466-467 (Tex. 1990). Other Texas courts have recognized that suits for infliction of emotional distress may be combined with a wide variety of other actions. See Massey v. Massey, 807 S.W.2d 391, 397 (Tex. App. - Houston [1st Dist.] 1991, no writ) and cases cited therein.

(2) The award of mental anguish damages for employer misconduct has already been upheld by Texas courts. See City

of Ingleside v. Kneuper, 768 S.W.2d 451, 460 (Tex. App. - Austin 1989, writ denied)(upholding $50,000 mental anguish award for unlawful termination). A state decision on a similar point is entitled to great respect. Polk County, Georgia v. Lincoln National Life Ins. Co., 262 F.2d 486, 489 (5th Cir. 1959).

(3) The related tort, intentional infliction of emotional distress, has already been recognized in an employment relationship. See, i.e., Havens v. Tomball Community Hospital, 793 S.W.2d 690, 692 (Tex. App. - Houston [1st Dist.] 1990, no writ)(finding the cause of action distinct from the wrongful discharge claim); Bushell v. Dean, 781 S.W.2d 652 (Tex. App. - Austin 1989), after remand, 820 S.W.2d 869 (1991)(upholding judgment for plaintiff); Service Lloyds Ins. Co. v. Greenhallgh, 771 S.W.2d 688 (Tex. App. - Austin 1989, no writ)(holding that recovery for intentional infliction of emotional distress is not excluded by the workers' compensation act). Accord Dean v. Ford Motor Credit Co., 885 F.2d 300 (5th Cir. 1989)(affirming judgment

for employee on pendent claim under Texas law for intentional infliction of emotional distress).

(4) Breach of the duty of ordinary care can and does occur in the context of employment under Texas law. It would not be reasonable to conclude that Texas would refuse to allow an employee to prove the cause of action of negligent infliction of emotional distress against an employer for a non-physical injury.

On the one hand, the employment relationship itself is founded upon a contract that imposes reciprocal duties upon the parties, duties that have been the subject of litigation in Texas courts. The Texas court long ago recognized that parties bound together in contractual relationships are capable of offending one another with tortious conduct. See Montgomery Ward v. Scharrenbeck, 204 S.W.2d 508, 510 (Tex. 1947). Under Texas law, a party to a contract to perform services has a common law duty to perform them with ordinary care. Wilson v. Ferguson, 747 S.W.2d 499 (Tex. App. - Tyler 1988, writ denied). Where a

contract is silent as to the duties to be performed by the employee, it is presumed the parties had in mind reasonable duties. Guardian Trust Co. v. Bauereisen, 121 S.W.2d 579, 132 Tex. 396 (1938).

Employers also have obligations to their employees. Texas law states that a corporation has a nondelegable duty to provide rules and regulations for the safety of its employees, to furnish safe machinery and instrumentalities, to provide a safe place to work, and to select careful and competent fellow servants. Wright v. Gifford-Hill & Co., Inc., 736 S.W.2d 828, 832 (Tex. App. - Waco 1987, writ ref'd n.r.e.), citing, Burk Royalty Co. v. Walls, 616 S.W.2d 911, 923-924 (Tex. 1981). Accord Martin v. Texaco, Inc., 726 F.2d 207 (5th Cir. 1984).

On the other hand, the duty not to engage in conduct which would result in foreseeable danger to others may arise not only as a matter of legal relation but also from a knowledge of the danger, which, in turn depends upon the probability of injury. Boyles v.

Kerr, 806 S.W.2d 255, 259 (Tex. App. - Texarkana 1991, writ granted). Apart from its legal duties as employer, Control Data Corporation had a common law duty to Jack Conaway under Texas law to exercise reasonable care to avoid foreseeable injury to him. See Hayes v. United States, 899 F.2d 438, 444 (5th Cir. 1990). One who voluntarily enters an affirmative course of action affecting interests of another is regarded as assuming a duty to act and must do so with reasonable care. Otis Engineering Corp. v. Clark, 668 S.W.2d 307 (Tex. 1983). See also Osuna v. Southern Pacific R.R., 641 S.W.2d 229, 230 (Tex. 1982); Seay v. Travelers Indemnity Co., 730 S.W.2d 774 (Tex. App. - Dallas 1987, no writ). Just as Conaway was entitled to a safe place to work, he was entitled to be free from arbitrary or discriminatory actions at odds with established and relied-upon procedures, practices, and course of dealing.

The duty of ordinary care is not imposed by the bargained for terms and conditions of the agreement, but rather by the

presupposition that civilized men and women owe duties, one to the other. The circumstances giving rise to the duty may involve a contractual relationship or they may not. An employee's "at will" status is not an umbrella that shields employers from tort causes of action.

Sister Circuits Have Not Excluded Employees from Recovery.

The Court of Appeals for the First Circuit upheld a judgment against an employer for negligent infliction of emotional distress in a suit arising from the plaintiff's termination from employment in Kelly v. Schlumberger Technology Corp., 849 F.2d 41, 44 (1st Cir. 1988), even though the cause of action had not previously been applied in an employment context in Louisiana. That court cited as precedent a Louisiana Court of Appeals opinion, Chappetta v. Bowman Transportation, Inc., 415 So. 2d 1019 (La. App. 1982), which was not an employment case.

The Sixth Circuit Court allowed recovery under Michigan

law of emotional distress damages for an employee who prevailed on a state law age discrimination claim in Moody v. Pepsi-Cola Metropolitan Bottling Co., Inc., 915 F.2d 201 (6th Cir. 1990), yet there does not appear to be any Michigan precedent for such recovery in an employment setting.

Following its review of commentaries and cases from a number of jurisdictions, the Supreme Court of California concluded that one's status as an employee should entitle him to a greater degree of protection from insult and outrage than if he were a stranger. See Alcorn v. Anbro Engineering, Inc., 86 Cal. Rptr. 88, 90, n. 2; 468 P. 2d 216, 218, n. 2 (1970).

Alternatively, The Fifth Circuit Court Should Have Certified The Question To The Supreme Court of Texas.

Petitioner requested, alternatively, in his motion for rehearing to the Fifth Circuit Court, that the Court certify the question regarding the application of the cause of action in an employment context to the Supreme Court of Texas, but such

request was denied. This Court stated in United Gas Pipe Line Co. v. Ideal Cement Co., 369 U.S. 134, 135 (1962)(per curiam): "We ought not...either accept the Court of Appeals' construction or, on an independent consideration, reject what the Alabama Supreme Court may later definitively approve...." At the very least, justice calls for certification of the question to the Supreme Court of Texas.

Conaway showed at trial numerous ways Control Data violated its own standards in its treatment of him from March 1984 to mid-1987. The jury agreed that Control Data was grossly negligent in its treatment of him, and the jury agreed that he suffered severe mental anguish as a result. Yet Conaway was denied the right to recover for this conduct because it occurred in an employment situation. Both as an employee and as a citizen, Conaway is entitled to his legal remedy for Control Data's harmful conduct. An employee is entitled to have access to the court's protection and the law's remedies against negligent, unlawful

conduct the same as any other litigant, particularly when the remedy has already been established by the controlling law of the relevant state.

II.

Has the Court of Appeals for the Fifth Circuit denied petitioner his right to trial by jury under the Seventh Amendment to the U.S. Constitution by refusing to recognize petitioner's cause of action for negligent infliction of emotional distress in an employment context?

It is the special duty of the federal courts to uphold and enforce the federal Constitution, and the judiciary must stay within the bounds of its constitutional power. By refusing to recognize the negligent infliction of emotional distress claim of Conaway because the unlawful conduct occurred during an employee-employer relationship, the Fiifth Circuit Court of Appeals has denied Jack Conaway his right to trial by jury guaranteed under the Seventh Amendment.

The Seventh Amendment Limits The Power of The Federal Court to Disregard The Jury's Verdict.

Where a verdict has been returned for a party, and there was evidence each way on the question, the verdict cannot be set aside; for that would interfere with the exclusive province of the jury secured by the Constitution. Stewart v. Sixth Ave. R. Co., 45 F. 21, 22 (S.D.N.Y. 1891). See City of Manchester v. Ericsson, 105 U.S. 347, 349 (1882). Review by a court of appeals of a jury verdict as to sufficiency of the evidence is exceedingly narrow because of the requirement of the right to jury trial preserved by the Seventh Amendment. Granberry v. O'Barr, 866 F.2d 112, 113 (5th Cir. 1988).

This Court granted certiorari in Wilkerson v. McCarthy, 336 U.S. 53, 55 (1949), "because of the importance of preserving for litigants in FELA cases their right to a jury trial." In that case, the Utah Supreme Court had affirmed the trial court's directed verdict against the employee. This Court found error by the Utah

Supreme Court in affirming the trial court's action in taking the case from the jury. Id. at 64. "[W]here jury trials are required, courts must submit the issues of negligence to a jury if evidence might justify a finding either way on those issues." Id. "[T]he issue of negligence is one for juries to determine according to their finding of whether an employer's conduct measures up to what a reasonable and prudent person would have done under the same circumstances." Id. at 61.

Justice Douglas, in a concurring opinion in Wilkerson, said, "The criterion governing the exercise of our discretion in granting or denying certiorari is not who loses below but whether the jury function in passing on disputed questions of fact and in drawing inferences from proven facts has been respected." Id. at 70-71.

The Seventh Amendment Protects Employees.

Under the Seventh Amendment, an employee is entitled to a jury trial in federal court on the employee's legal claims against the employer. See Miller v. Fairchild Industries, Inc., 885 F.2d

498, 507 (9th Cir. 1989), cert. denied, 110 S.Ct. 1524 (1990); Lubin v. American Packaging Corp., 760 F.Supp. 450, 454 (E.D. Pa. 1991). When a case involves both jury trial on the emotional distress claim and a bench trial on a Title VII claim, any essential factual issues central to both claims must be first tried to the jury, so that the litigant's Seventh Amendment jury trial rights are not foreclosed on common factual issues. Marshall v. Nelson Electric, a Unit of General Signal, 766 F. Supp. 1018, 1025 (N.D. Okla. 1991)(Title VII claim). An employee was entitled to jury trial on his claim of intentional inflictional of emotional distress arising out of religious discrimination even though he was not entitled to a jury trial on the civil rights issue in Vaughn v. Ag Processing, Inc., 459 N.W.2d 627, 637 (Iowa 1990).

Petitioner Was Denied His Right to a Jury Trial By The Circuit Court's Judgment.

An inmate was denied his Seventh Amendment right to trial by jury in a civil rights action when the magistrate judge made

credibility determinations in the course of deciding whether the inmate would be able to survive a motion for a directed verdict. Henson v. Falls, 912 F.2d 977, 979 (8th Cir. 1990). Similarly, in the present case, the magistrate judge concluded (a) that Conaway's claim of negligent infliction of emotional distress arose solely from termination, a conclusion inconsistent with the evidence presented at trial. The magistrate judge further concluded (b) that Texas does not recognize the cause of action in an employment context, a finding not supported by Texas law. The Fifth Circuit Court affirmed the judgment on the basis of the second finding, without review of the evidence. By so doing, the Circuit Court sanctioned the setting aside of the jury's verdict in violation of Conaway's right to jury trial.

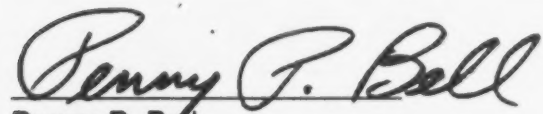
Employees should not be set aside as a class of citizens for whom established legal rights are unavailable simply because the harmful conduct occurred during the employment relationship. Neither the district court nor the circuit court has set out a rational

basis for excluding employees from the scope of the cause of action. The disposition of pendent claims of employees seeking relief under federal anti-discrimination laws should be handled in accordance with established principles of law. The denial of Conaway's jury verdict because he was an employee imposes a predetermined condition upon the exercise of his constitutional right to trial by jury. It is by exclusions and exceptions of this kind that constitutional protections are whittled away. Constitutional guarantees pertaining to personal rights should be available to all alike and should apply to every citizen, in whatever context.

The Fifth Circuit's affirmation of the judgment against Conaway violates the Erie v. Tompkins principle and its codification as the Rules of Decision Act; it is at odds with the law of Texas; it is in conflict with similar opinions by other circuit courts; and it denied Conaway his right to trial by jury under the

Seventh Amendment. For these reasons, petitioner earnestly requests that his Petition for Writ of Certiorari be granted.

Respectfully submitted,



Penny P. Bell
5847 San Felipe, Suite 4295
Houston, Texas 77057
(713) 869-4388
ATTORNEY FOR PETITIONER,
JACK W. CONAWAY

APPENDIX

Judgment of the Fifth Circuit Court
Opinion of the Fifth Circuit Court
Order on Petition for Rehearing
Judgment of the District Court
Memorandum Opinion of District Court

*****

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-2695
Summary Calendar

D. C. Docket No. CA H 88 3373

JACK W. CONAWAY, Plaintiff-Appellant,

versus

CONTROL DATA CORPORATION, Defendant-Appellee

Appeal from the United States District Court
for the Southern District of Texas

Before JOLLY, DAVIS and SMITH, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal

and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

March 10, 1992

****

JACK W. CONAWAY, Plaintiff-Appellant,

versus

CONTROL DATA CORPORATION, Defendant-Appellee

No. 91-2695
Summary Calendar

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

March 10, 1992

Appeal from the United States District Court
for the Southern District of Texas

Before JOLLY, DAVIS, and SMITH, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

Because he was fired, Jack Conaway sued his employer, Control Data Corporation ("CDC"), for negligent and intentional infliction of emotional distress, breach of contract and discrimination under the Age Discrimination in Employment Act of 1967 ("ADEA"). The district court granted summary judgment in

favor of CDC on the intentional infliction of emotional distress claim. At trial, the district court granted a directed verdict in favor of CDC on the breach of contract claim, finding that there was no employment contract altering Conaway's "at will" status, and also on the ADEA claim, finding that Conaway did not file his complaint with the EEOC during the applicable time period. The court further held that there was no equitable basis to toll the period or estop the defendant from asserting the limitation as a defense. The jury returned a verdict of $50,000 for Conaway on the negligent infliction of emotional distress claim. The district court, however, granted a JNOV in favor of CDC, holding that Texas does not recognize a claim for negligent infliction of emotional distress in the employment context.

We hold that the district court did not err in granting CDC a directed verdict on Conaway's ADEA claim on his breach of contract claim. We also hold that the district court properly granted CDC's motion for JNOV with respect to Conaway's

negligent infliction of emotional distress claim. Therefore, we affirm the decision and judgment of the district court.

I.

Jack Conaway was employed by CDC for more than twenty-two years--from January 1964 until November 14, 1986. On October 15, 1986, Conaway was notified that his employment with CDC would be terminated effective November 14, 1986, because of a cut-back in personnel.

Conaway contends that he was dismissed because of his age and that his termination was otherwise wrongful. He was fifty-one years old at the time. Conaway did not file a claim of age discrimination under the ADEA until some eleven-plus months later. On September 13, 1988, he filed this suit in district court alleging that CDC violated the ADEA, breached his employment contract and negligently and intentionally inflicted emotional distress.

Upon CDC's motion, the district court granted summary

judgment in favor of CDC on Conaway's intentional infliction of emotional distress claim. The remaining issues were tried by a jury. At the close of Conaway's evidence, the district court granted CDC's motion for a directed verdict on Conaway's ADEA claim, finding that the action was barrred by the applicable statute of limitations. The district court also granted a directed verdict on Conaway's claim for breach of contract because the evidence did not support the existence of a contract. However, the district court denied CDC's motion for a directed verdict on the negligent infliction of emotional distress claim and submitted that cause of action to the jury, which awarded Conaway $50,000.

CDC filed a motion for judgment notwithstanding the verdict. The court issued its memorandum opinion and entered a final judgment, granting CDC's motion for judgment notwithstanding the verdict and awarding Conaway nothing. In doing so, the district court held that Texas law does not recognize claims for negligent infliction of emotional distress in employment termination cases.

Conaway appeals.

II.

On appeal, Conaway argues: (1) Texas does recognize claims for negligent infliction of emotional distress in the context of employment termination; (2) that there was evidence to support the existence of an employment contract with CDC; and (3) that his ADEA claim was not time barred, because either the limitation period was equitably tolled or CDC was equitably estopped from asserting the limitation period as a defense.

We affirm the district court's directed verdict on the breach of contract claim and the ADEA claim. We also affirm the district court's JNOV on the negligent infliction of emotional distress claim.

III.

The standard of review for motions for directed verdict and for JNOV was clearly set out in *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969)(en banc). The court should not grant the motion unless "the facts and inferences point so strongly and

overwhelmingly in favor of one party that the court believes that reasonable men could not arrive at a contrary verdict. *Id.* A directed verdict should be granted when there is no evidence before the jury upon which a jury could properly proceed to find for the party opposing the motion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986).

IV.

Conaway argues that Texas recognizes claims for negligent infliction of emotional distress, and that therefore, the district court incorrectly granted a JNOV in favor of CDC. Even though Texas does recognize the tort of negligent infliction of emotional distress without requiring any physical injury, *St. Elizabeth Hospital v. Garrard*, 730 S.W.2d 649, 654 (Tex. 1987), "[t]he Texas Supreme Court does not yet recognize a separate cause of action in the employee/employer relationship for negligent infliction of emotional

distress." *Fiorenza v. First City Bank-Central*, 710 F.Supp. 1104, 1105 (E.D. Tex. 1988). *See also Williams v. Sealed Power Corp.*, 1990 WL 102799 (N.D.Tex. 1990); *Soto v. Laredo*, 764 F.Supp. 454, 457 (S.D. Tex. 1991).[1] Therefore, the district court did not err in granting CDC a JNOV on Conaway's claim for negligent infliction of emotional distress arising out of the employee/employer context.

---

[1] Only one court has implied that a claim for negligent infliction of emotional distress in the employment context may be recognized in Texas. In *Abston v. Levi Strauss & Co.*, 685 F.Supp. 152, 157-58 (E.D. Tex. 1987) the court held that summary judgment was inappropriate where the plaintiff had testified that he suffered anger, depression, embarrassment and shock as a result of his termination. The cases in which the courts found that the Texas Supreme Court has not recognized the tort of negligent infliction of emotional distress in the employment context are more recent and the courts were correct in finding that this tort has not been recognized in Texas.

V.

Conaway argues that his employment contract includes oral promises made by CDC, the policies and procedures manual and a grievance procedure pamphlet. The company's last transfer letter to Conaway, dated July 1, 1985, stated that the letter represented the sole agreement between Conaway and CDC. "It, including any brochures, provided to you by the personnel department, which may be amended by the company in the future, constitutes and expresses the entire agreement regarding your employment. Any previous promises, representatives [sic], and understanding relative to any terms and conditions are not to be considered as part of this offer unless expressed here in writing." The manual, however, states that nothing in it is intended to create a contract. Conaway argues that CDC did not give him fair and just treatment as promised and did not follow the procedures in the manual. These promises and procedures were not part of any employment contract.

In *Totman v. Control Data Corp.*, 707 S.W.2d 739, 744 (Tex. Ct. App. 1986), the court held that the plaintiff could not recover for breach of contract under Texas law "because he failed to show the trial court where there was an express agreement or written representation that dealt with the procedures for discharge of employees that altered the 'at will' status of his employment contract." In *Lumpkin v. H&C Communications, Inc.*, 755 S.W.2d 538, 539 (Tex. Ct. App. 1st Dist. 1988), the court held that in order to establish a cause of action for wrongful termination, a plaintiff must prove that there was a specific agreement in a written contract that the employer did not have the right to fire the employee at will. No Texas case has recognized a duty of good faith and fair dealing owed by an employer to an employee. *Rodriguez v. Benson Properties, Inc.*, 716 F.Supp. 275, 276 (W.D. Tex. 1989). In the case at hand, Conaway did not produce evidence sufficient to prove that there was any written agreement that altered his status as an "at will" employee, and therefdore the

district court correctly granted a directed verdict in favor of CDC on Conaway's breach of contract claim.

VI.

A.

Conaway argues that his ADEA claim should not be barred by the statute of limitations because the statue equitably should be tolled or because the defendant should be estopped from asserting the time limitation as a defense.[2] The timely filing of a complaint with the EEOC is not a jurisdictional requirement; the limitation statute is subject to estoppel and equitable tolling. *Zipes v.*

---

[2] 29 U.S.C. 626 provides that in order to bring a civil suit under the ADEA in a "deferral state" such as Texas, the plaintiff must first file a charge alleging unlawful discrimination with the EEOC within 300 days of the alleged unlawful practice. Conaway filed a charge with the EEOC 345 days after he received notice of his termination, and 315 days after he was terminated.

TransWorld Airlines, Inc., 455 U.S. 385, 393, 102 S.Ct. 1127, 1132, 71 L.Ed.2d 234 (1982). "A defendant is equitably estopped from asserting that a claim is time-barred where its conduct induced a plaintiff to refrain from exercising its rights. 'Equitable tolling focuses on the plaintiff's excusable ignorance of the employer's discriminatory act.'" *Amburgey v. Cohart Refractories Corp.*, 936 F.2d 805, 810 n. 14 (5th Cir. 1991).

If the complaint is not filed within 300 days, the plaintff has the burden of demonstrating a factual basis to toll the period. *Blumberg v. HJCA Management Co.*, 848 F.2d 642 (5th Cir. 1988), *cert. denied*, 488 U.S. 1007, 109 S.Ct. 789, 102 L.Ed.2d 781. "The time begins when facts that would support a cause of action are or should be apparent." *Id.* The time period generally begins to run when the employee receives notice of the allegedly discriminatory decision, not when the employment actually ceases. *Amburgey*, 939 F.2d at 810. This court has held that a plaintiff knows enough to support filing a claim when that plaintiff is "aware

that [he] is being replaced in a position [he] believes [he] is able to handle by a person outside the protected age group." *Blumberg,* 848 F.2d at 645; *Pruet Production Co. v. Ayles*, 784 F.2d 1275, 1279 (5th Cir. 1986).

Conaway testified that on October 15, 1989, he was notified he would be displaced; yet he was also told that there were going to be three openings in his department, and he admits that he knew the three new positions were going to men in their early forties. These facts are the stuff of which ADEA claims are made. But Conaway argues that he did not know the reason for his dismissal until December 9, 1986, when he received a letter from CDC stating that he had been terminated in connection with a restructuring of his department that entailed a major downsizing. He argues that he knew this justification was false and that he then realized he was terminated because of his age. Conaway's allegation is not supported by the evidence. He was told in 1985 by another CDC employee that that employee had been instructed

to get rid of Conaway because he had been around too long. But most importantly, Conaway by his own admission knew by the time he was terminated, that three new younger sales persons had been hired, even though the reason given for his termination was a cut-back in his department. Therefore, the limitation period cannot be tolled based on Conaway's ignorance of the discrimination. The statutes began to run at the latest on December 9, 1985, when he was terminated, some 315 days before he filed his ADEA charge.

B

The EEOC's misleading the plaintiff about the nature of his rights can also be the basis for equitable tolling. *Blumberg*, 848 F.2d at 644. In an affidavit in response to CDC's motion for directed verdict, Conaway stated that he called the EEOC on or around March 10, 1987, to ask about claim filing procedures. He stated that the EEOC told him he could file a suit within two years of the date of discrimination or three years if the discrimination was

intentional. He was also told that he could file a suit 60 days after he filed a complaint with the EEOC.[3] He argues, however, that he was misled when, according to him, the EEOC failed to tell him that he had to file the complaint with the EEOC within 300 days of the discrimination; if he had been told this, he would have filed a complaint that month. He contends, therefore, that because the EEOC misled him, the time limitation should be equitably tolled.

This circuit has not addressed the issue of whether an accurate, but incomplete, oral statement by the EEOC can be the basis for equitable tolling. The EEOC undoubtedly engages in

---

[3] 29 U.S.C. 626(d)(2) provides that in deferral states such as Texas, a complaint must be filed with the EEOC within 300 days of the alleged unlawful practice. Section 626(d) also provides that no civil action may be filed under ADEA until 60 days after a charge is filed with the EEOC. A civil suit must be filed within two years of when the cause of action accrued or three years if the discrimination was intentional. Section 626(e)(1).

numerous telephone calls every day. It would be virtually impossible for the EEOC or a defendant to rebut a plaintiff's unsupported allegation that the EEOC provided incomplete information in a telephone conversation. Allowing a plaintiff equitably to toll a time limitation based on incomplete information provided in a telephone conversation would create a great potential for abuse. Thus, we hold that the alleged incomplete oral statements made by the EEOC to Conaway during a telephone conversation will not support equitable tolling.

C

Conaway also argues that CDC equitably should be estopped from asserting the time limitation as a defense because CDC induced him to refrain from exercising his legal rights. Conaway argues that CDC assured him that his termination was being reviewed, and that consequently he did not file an ADEA claim. Correspondence between Conaway and CDC shows that Conaway's claim was reviewed, and that upon review, it was

determined that Conaway's termination was handled properly. At no point did CDC represent that upon review, Conaway would be rehired. Nor did it ever represent that his complaint was in the "official grievance procedure." None of the actions that Conaway points to can be said to have reasonably induced him into foregoing his ADEA claim. Consequently, Conaway has proved no factual basis for equitable estoppel or equitable tolling. The district court therefore properly granted a directed verdict in favor of CDC on Conaway's ADEA claim because Conaway did not file a complaint with the EEOC within the governing time period.

VII

In conclusion, we hold that the district court properly granted CDC's motion for judgment notwithstanding the verdict with respect to Conaway's claim for negligent infliction of emotional distress because Texas has not recognized such a cause of action in the employment context. We also hold that the district court appropriately granted a directed verdict in favor of CDC on

Conaway's breach of contract claim because Conaway failed to prove there was any written agreement altering his status as an "at will" employee. Finally, we hold that the district court correctly granted a directed verdict in favor of CDC on Conaway's ADEA claim because Conaway did not file a complaint with the EEOC within the governing time period. The judgment of the district court is therefore AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 91-2695

JACK W. CONAWAY, Plaintiff-Appellant,

versus

CONTROL DATA CORPORATION, Defendant-Appellee

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING
(April 6, 1992)

Before JOLLY, DAVIS and SMITH, Circuit Judges.

PER CURIAM: IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

E. Grady Jolly
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JACK W. CONAWAY, Plaintiff	*	
	*	CIVIL ACTION
vs.	*	NO. H-88-3373
	*	
CONTROL DATA CORPORATION, Defendant	*	

FINAL JUDGMENT.

Based on this Court's findings in its Memorandum Opinion of the same date, it is hereby ORDERED and ADJUDGED that the Defendant's Motion for Judgment Notwithstanding the Judgment [sic] is GRANTED.

Accordingly, it is hereby ADJUDGED that plaintiff Jack W. Conaway TAKE NOTHING from defendant Control Data Corporation.

It is further ORDERED, ADJUDGED, and DECREED that each party shall bear their own costs.

All relief not herein granted is hereby denied.

This is a FINAL JUDGMENT.

The Clerk shall send a copy of this Final Judgment to the respective parties.

DONE at Houston, Texas, this 24th day of May, 1991.

NANCY K. PECHT
UNITED STATES MAGISTRATE JUDGE

****

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JACK W. CONAWAY, Plaintiff	*	
	*	CIVIL ACTION
vs.	*	NO. H-88-3373
CONTROL DATA CORPORATION, Defendant	*	

MEMORANDUM OPINION

This case was tried to a jury from March 11 to March 15, 1991, before the undersigned Magistrate Judge by consent of the parties. On March 15, 1991, the jury entered its verdict in this cause, finding the Defendant, Control Data Corporation, had

negligently inflicted emotional distress upon the Plaintiff, Jack W. Conaway. The jury further awarded the Plaintiff actual damages in the amount of $50,000. The Defendant timely filed a Motion for Judgment Notwithstanding the Verdict pursuant to Fed. R. Civ. P. 50(b). For the reasons stated below, the verdict is set aside.

I. Statement of the Case

Plaintiff, Jack W. Conaway, was employed by Defendant, Control Data Corporation ("CDC"), from January 1964 until November 14, 1986. The acts which resulted in this lawsuit commenced on October 15, 1986, when Conaway was notified that his employment with CDC would be terminated, effective November 14, 1986. The termination of Conaway's employment was due to a reorganization of CDC for financial reasons which resulted in the reduction of a number of management and sales positions.

Conaway alleged that he was dismissed by CDC because of his age and that his termination was wrongful. Conaway was

51 years old at the time of his dismissal. On September 25, 1987, Conaway filed a claim of age discrimination under the Age Discrimination in Employment Act of 1967, ("the ADEA") 29 U.S.C. 626, with the Houston District Office of the Equal Employment Opportunity Commission.

Conaway commenced this suit on September 23, 1988, when he filed his Original Complaint alleging that his dismissal from CDC resulted in the following causes of action:

1. Violation of the ADEA
2. Breach of Employment Contract
3. Intentional and Negligent Infliction of Emotional Distress

On January 3, 1990, CDC timely filed a Motion for Summary Judgment (Docket Entry #4). On February 26, 1990, CDC's Motion for Summary Judgment was denied except as to Conaway's claim for intentional infliction of emotional distress which was granted. The remaining issues were tried to a jury. The trial commenced on March 11, 1991. On March 14, 1991, at

the close of Plaintiff's evidence, CDC moved for a directed verdict on Conaway's first cause of action, violation of the ADEA, on the ground that the claim was barred by the applicable statute of limitation, 29 U.S.C. 626. The Court granted CDC's motion finding that the statute did bar this action and that no ground existed for equitable tolling of the limitation period. On the same date, the Court also granted CDC's motion for directed verdict on Conaway's second cause of action, breach of employment contract, as the evidence did not support the finding of an employment contract. The Court denied CDC's motion for a directed verdict on the third cause of action, negligent infliction of emotional distress, because there was evidence that Plaintiff had suffered distress of his loss of employment. The negligent infliction of emotional distress cause of action was submitted to the jury on March 15, 1991, and on that date the jury entered its verdict. The jury found that CDC had negligently inflicted emotional distress upon Conaway and awarded Conaway actual

damages in the amount of $50,000. CDC timely filed a Motion for Judgment Notwithstanding the Verdict pursuant to Fed. R. Civ. P. 50(b).

II. Discussion

In evaluating a Motion for Judgment Notwithstanding the Verdict, a court is to consider all of the evidence, giving the party opposing the motion the benefit of all reasonable inferences from the evidence. Boeing v. Shipman, 411 F.2d 365, 372 (5th Cir. 1969). To sustain the verdict, however, a court must find that it is supported by substantial evidence. Nicholas Construction Corporation v. Cessna Aircraft Co., 808 F.2d 340, 346 (5th Cir. 1985); Boeing v. Shipman, 411 F.2d at 375.

The jury's findings cannot stand if they rest on speculation or conjecture, nor may they rest upon unreasonable inferences from the evidence. Nicholas Construction, supra; Brock v. Merrill Dow Pharmaceutical, 874 F.2d 307, 309 (5th Cir. 1989). A court should grant the motion if, viewing all the evidence in a light most

favorable to the nonmovant, the facts and inferences therefrom point so strongly and overwhelmingly in favor of the motion that reasonable jurors could not arrive at a contrary verdict.

Fed. R. Civ. P. 50(b) enables a court to determine whether there was any question of fact to have been submitted to the jury and whether the verdict reached by the jury is erroneous as a matter of law.

The Texas Supreme Court does not recognize a separate cause of action for negligent infliction of emotional distress in the employer/employee relationship arising solely from the termination of employment. Williams v. Sealed Power Corp., No. 4-88-254-E (N.D. Tex. 1990)(1990 WL 102799); Fiorenza v. First City Bank-Central, 710 F.Supp. 1104, 1105 (E.D. Tex. 1988). Because a separate cause of action for negligent infliction of emotional distress arising from termination of employment is not recognized in Texas, Conaway's claim for negligent infliction of emotional distress should not have been submitted to the jury.

In the present case, Conaway readily acknowledges that his claim of negligent infliction of emotional distress arose from the termination of his employment. Conaway alleges that CDC terminated him because of his age and that CDC, in wrongfully terminating him, negligently caused him emotional distress. Conaway also alleges that CDC breached his claimed contract of employment. This cause of action also relates directly to the termination of Conaway's employment, which allegedly resulted in CDC's negligently inflicting emotional distress upon him. Thus, Conaway's claim of negligent infliction of emotional distress arose solely from the termination of his employment.

The facts of this case are very similar to those in Fiorenza and Williams, supra, where the plaintiffs' claims of negligent infliction of emotional distress also arose solely from the termination of their employment. In both Fiorenza and Williams, supra, the courts dismissed the plaintiffs' claims for negligent infliction of emotional distress because no such cause of action is

recognized in Texas. Thus, as in Fiorenza and Williams, supra, Conaway's claim of negligent infliction of emotional distress which arises solely from the termination of employment is not a recognized cause of action under Texas law.

Based on the foregoing, this Court finds that Conaway's claim for negligent infliction of emotional distress is not a recognized separate cause of action in Texas; theredore the jury's verdict finding that the Defendant negligently inflicted emotional distress upon the Plaintiff and awarding the Plaintiff damages should be set aside. Accordingly, it is HEREBY ORDERED that Defendant's Motion for Judgment Notwithstanding the Verdict is GRANTED.

The Clerk shall send a copy of this Memorandum Opinion to all counsel of record.

DONE at Houston, Texas, this 24th day of May, 1991.

NANCY K. PECHT
UNITED STATES MAGISTRATE JUDGE

(2)

No. 92-0073

Supreme Court, U.S.
FILED
AUG 6 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

JACK W. CONAWAY,

Petitioner,

vs.

CONTROL DATA CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

LYNNE GOMEZ
ROSS, BANKS, MAY,
CRON & CAVIN
20th Floor, Coastal Tower
9 Greenway Plaza
Houston, Texas 77046
(713) 626-1200

KAREN L. HEUER
Counsel of Record
8100 34th Avenue South
Minneapolis, Minnesota 55404
(612) 853-3050

Attorneys for Respondent

2484
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

14

QUESTIONS PRESENTED FOR REVIEW

1. Where the Supreme Court of Texas has recognized a cause of action for negligent infliction of emotional distress, may the Court of Appeals for the Fifth Circuit disregard *Erie v. Tompkins* and the Rules of Decision Act by refusing to apply the cause of action to an employment context?

2. Has the Court of Appeals for the Fifth Circuit denied petitioner his right to trial by jury under the Seventh Amendment to the United States Constitution by refusing to recognize petitioner's cause of action for negligent infliction of emotional distress in an employment context?

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Table of Contents	ii
Table of Citations	iii
Statement of the Case	1
Statement of Jurisdiction	2
Summary of Argument	2
Reasons for Denying the Writ	4
I. Texas has not recognized a cause of action for negligent infliction of emotional distress in an employer/employee setting.	4
II. Petitioner is merely speculating when he states that the Texas Supreme Court would have favored his claim.	6
III. The District Court and the Fifth Circuit Court of Appeals properly granted judgment n.o.v. in the case based on the law of the State of Texas. This is the proper application of *Erie v. Tompkins*.	7
IV. Petitioner has not been denied his right to a jury trial.	8
Conclusion	9

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Abston v. Levi Strauss & Co., 684 F. Supp. 152 (E.D. Tex. 1987) 7

Bushell v. Dean, 781 S.W. 2d 652 (Tex. App. Austin 1989) 6

City of Ingleside v. Kneuper, 768 S.W. 2d 451 (Tex. App. Austin 1989, writ denied) 4, 5

Cort v. Ash, 422 U.S. 66 5

Dean v. Ford Motor Credit Co., 885 F.2d 300 (5th Cir. 1989) 6

Erie R. v. Tompkins, 304 U.S. 64 (1938) .....i, 7

Fiorenza v. First City Bank, 710 F. Supp. 1104 (E.D. Tex. 1988).....4, 5, 7, 8

Massey v. Massey, 807 S.W. 2d 391 (Tex. 1990) 6

Service Lloyds Ins. Co. v. Greenhallgh, 771 S.W. 2d 688 (Tex. App. Austin 1989, no writ)..... 6

St. Elizabeth Hospital v. Gerrard, 730 S.W. 2d 649 (Tex. 1987) 7

Soto v. Laredo, 764 F. Supp. 454 (S.D. Tex. 1991) 7, 8

Contents

Page

Williams v. Sealed Power Corporation, No. 4-88-254-E (N.D. Tex. 1990) (1990 W.L. 102799) 4, 5, 7, 8

Statute Cited:

28 U.S.C.A. § 1254 (West Supp. 1992) 2

United States Constitution Cited:

Seventh Amendment i

No. 92-0073

In the

Supreme Court of the United States

October Term, 1992

JACK W. CONAWAY,

Petitioner,

vs.

CONTROL DATA CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Control Data accepts petitioner's Statement of the Case and only adds that the trial court properly made its decision to grant judgment n.o.v. based, not only on the facts of the *Conaway* case, but on the basis of established Texas law which, at this time, does not recognize the tort of negligent infliction of emotional distress based on termination in an employer/employee setting. *See* Petitioner's Appendix, page 34.

STATEMENT OF JURISDICTION

Petitioner has not identified any grounds for a writ of certiorari to be granted in this case. Grant of such a writ is not a matter of right. 28 U.S.C.A. § 1254. The Supreme Court grants such writs where special and important reasons have been shown to exist.

In this case petitioner does not even allege that special and important circumstances exist. There is no conflict between circuits to be resolved, no federal question, and absolutely no departure from precedent occurred in the case below.

SUMMARY OF ARGUMENT

For the following reasons, Control Data Corporation respectfully prays that a writ of certiorari will not issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled proceeding on March 10, 1992.

I. Texas has not recognized a cause of action for negligent infliction of emotional distress.

Petitioner's statement that Texas has recognized negligent infliction of emotional distress as a cause of action is misleading because Texas courts have specifically noted that the cause of action does not apply to the employment setting. Thus, Control Data was properly granted judgment n.o.v. below. As petitioner argues, the federal court must, and in this case did, follow applicable state law regarding the pendent claims.

II. There is no Texas precedent that supports petitioner's assertion that the Texas Supreme Court would have favored his claim.

Petitioner argues that as to his negligence claim, Texas law

must be followed, but asks this Court to speculate that Texas law would be favorable to him rather than follow Texas law set forth in cases on point.

III. The district court's grant of judgment n.o.v. was based on law not on the facts of the case, thus the province of the jury was not invaded.

Petitioner argues that he should be allowed recovery under a cause of action that does not exist. That would have been the outcome here if judgment n.o.v. had not been granted. Respondent would have been denied its right to a fair trial because respondent was not presenting a defense against "negligent termination." Knowing that there was no such cause of action, respondent concentrated on the breach of contract and age discrimination claims. By granting judgment n.o.v., the district court simply followed the law of the State of Texas and took a case from the jury that really should not have gone to the jury in the first place.

IV. Petitioner has not been denied his right to a jury trial.

Since Texas does not recognize a negligent termination cause of action, petitioner did not have a right to a trial on that issue at all. Thus a grant of judgment n.o.v. did not deny petitioner any of his rights.

REASONS FOR DENYING THE WRIT

I.

TEXAS HAS NOT RECOGNIZED A CAUSE OF ACTION FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS IN AN EMPLOYER/EMPLOYEE SETTING.

Petitioner improperly asserts that Texas has recognized a cause of action for negligent infliction of emotional distress in the employment context. The only Texas precedent petitioner cites in support of his first question for review is *City of Ingleside v. Kneuper*, 768 S.W. 2d 451, 460 (Tex. App. Austin 1989, writ denied). This is not a case of common law negligent infliction of emotional distress but a case brought under the Texas whistle-blower statute. In the case at bar, there has been no finding of wrongful termination, consequently *City of Ingleside* does not support petitioner's assertion that Texas recognizes his attempted cause of action.

The *City of Ingleside* decision cited by petitioner, follows the logic of *Fiorenza v. First City Bank*,[1] 710 F. Supp. 1104, 1105 (E.D. Tex. 1988), a Texas case on point. *Fiorenza* states that the "Texas Supreme Court does not yet recognize a separate cause of action in the employee/employer relationship for negligent infliction of emotional distress." *Fiorenza*, 710 F. Supp. 1104, 1105. The court in *Fiorenza* goes on to observe that Texas has carved out one exception[2] and that is the situation where an employee refuses to

---

1. *Fiorenza v. First City National Bank* and *Williams v. Sealed Power Corp.* were relied on by both the district court and the Fifth Circuit Court of Appeals in their decisions below.

2. The court noted one edception to the rule that: the cause of action for negligent infliction of emotional distress does not exist in Texas in the employer/employee setting.

violate a criminal statute. *Id. City of Ingleside v. Kneuper*, was not a common law case but, logically, it falls into the only exception noted by the *Fiorenza* court. Petitioner's claim does not fall within that exception and, recognizing this, he has not even alleged that it does.

It was the *Fiorenza* decision that was relied on by the United States District Court in *Williams v. Sealed Power Corporation*, No. 4-88-254-E (N.D. Tex. 1990) (1990 W.L. 102799) when it dismissed a pendent state claim for negligent infliction of emotional distress based on termination. The *Williams* court noted that Texas does not recognize negligent infliction of emotional distress in the employer/employee setting (citing to *Fiorenza*), and thus dismissed the claim with prejudice.

The United States Supreme Court depends upon district courts and courts of appeals for initial determinations of questions of state law and its practice is to show deference to such determinations. *Cort v. Ash*, 422 U.S. 66. It is clear that the *Williams* court, the district court in this case, and the Fifth Circuit Court of Appeals, all determined the current state of Texas law regarding the issue presented by petitioner. The courts below then applied that law, quite properly to this case. Consequently, review of this decision is unnecessary. *Cort v. Ash*, 422 U.S. 66.

II.

PETITIONER IS MERELY SPECULATING WHEN HE STATES THAT THE TEXAS SUPREME COURT WOULD HAVE FAVORED HIS CLAIM.

Petitioner, while arguing that the courts must apply Texas law to his negligent infliction of emotional distress claim, fails to cite any Texas precedent that supports his position.

Petitioner cites several Texas cases dealing with *intentional* infliction of emotional distress. *See Havens v. Tomball Community Hospital*, 793 S.W. 2d 690 (Tex. App. Houston (1st Dist.) 1990, no writ); *Bushell v. Dean*, 781 S.W. 2d 652 (Tex. App. Austin 1989); *Service Lloyds Ins. Co. v. Greenhallgh*, 771 S.W. 2d 688 (Tex. App. Austin 1989, no writ); *Dean v. Ford Motor Credit Co.*, 885 F.2d 300 (5th Cir. 1989); *Massey v. Massey*, 807 S.W. 2d 391 (Tex. 1990). However, intentional infliction of emotional distress is not a claim that remained in petitioner's case at the time of trial and it is not a point on appeal.

After raising intentional infliction of emotional distress, a claim disposed of by summary judgment in this case, as a valid cause of action in Texas, petitioner launches into a convoluted review of various decisions intended to lead to the conclusion that the Texas Supreme Court would, at this time, recognize a cause of action for negligent infliction of emotional distress in an employer/employee setting. This entire argument is flawed because petitioner cannot point to a case that supports his conclusion.

Recognizing the weakness in the argument, petitioner then cites to "sister circuits" which have recognized, to one degree or another, negligent infliction of emotional distress in or outside the employer/employee setting. This tact cannot advance his cause because Texas law is at issue here.

The only relevant precedent to this case is Texas precedent, which has been identified above as clearly in support of both decisions below.

III.

THE DISTRICT COURT AND THE FIFTH CIRCUIT COURT OF APPEALS PROPERLY GRANTED JUDGMENT N.O.V. IN THE CASE BASED ON THE LAW OF THE STATE OF TEXAS. THIS IS THE PROPER APPLICATION OF *ERIE V. TOMPKINS.*

Erie R. v. Tompkins, 304 U.S. 64 (1938) requires federal courts to apply state law to state law claims that come before federal courts as in this case, based on the pendent jurisdiction of the federal court to resolve all issues in the case. In the case at bar, the federal magistrate was the judge before whom the parties agreed to try this case. Magistrate Pecht properly applied Texas law to the facts of the case. Texas law, contrary to what petitioner would have this Court believe, does not recognize the independent tort of negligent infliction of emotional distress in the employer/employee setting absent wrongful discharge.

Petitioner is correct that Texas, like many other jurisdictions does recognize the tort of negligent infliction of emotional distress. *St. Elizabeth Hospital v. Gerrard,* 730 S.W. 2d 649, 654 (Tex. 1987). Texas also recognizes the tort of intentional infliction of emotional distress in the employer/employee setting. *Abston v. Levi Strauss & Co.*, 684 F. Supp. 152, 157 (E.D. Tex. 1987). However, the claim petitioner attempted to recover for is really negligent termination. His alleged emotional distress resulted from his termination. This is not a tort that is recognized in Texas. *Fiorenza v. First City Bank-Central*, 710 F. Supp. 1104, 1105 (E.D. Tex. 1988). *See also, Williams v. Sealed Power Corp.*, 1990 W.L. 102799 (N.D. Tex 1990); *Soto v. Laredo*, 764 F. Supp. 454, 457 (S.D. Tex. 1991).

Petitioner makes two arguments in support of the theory that Texas allows the negligent termination cause of action. First, he states the district court should have looked to sister states to determine Texas law in this area since the Texas position is unclear. Alternatively, petitioner suggests that since the Texas Supreme Court has never specifically stated that the cause of action *does not* exist, the district court was obligated to recognize the cause of action.[3] Unfortunately for petitioner, Texas law on this issue *is* clear, and review of the laws of other jurisdictions is both unnecessary and inappropriate. Texas simply does not acknowledge a cause of action for negligent termination. *Fiorenza v. First City Bank-Central*, 710 F. Supp. 1104, 1105 (E.D. Tex. 1988). *See also, Williams v. Sealed Power Corp.*, 1990 W.L. 102799 (N.D. Tex. 1990); *Soto v. Laredo*, 764 F. Supp. 454, 457 (S.D. Tex. 1991). Thus both the district court and the Fifth Circuit properly granted and upheld judgment n.o.v. on that basis.

IV.

PETITIONER HAS NOT BEEN DENIED HIS RIGHT TO A JURY TRIAL.

It is clear from the argument above, that Texas does not recognize a cause of action for negligent infliction of emotional distress in the employment setting. That is exactly the claim that petitioner wanted to put to a jury. When a cause of action does not exist, and judgment n.o.v. is granted for that reason, no right is denied, because no right existed in the first place.

The judgment n.o.v. in this case did not invade the province of the jury because it was based solely on legal issues which are the province of the court.

---

3. In our legal system, we do not assume that a law exists if it is not enumerated, we pass a law when there is a need.

CONCLUSION

For the reasons stated above, this Court should deny Mr. Conaway's petition for a writ of certiorari.

Respectfully submitted,

LYNN GOMEZ
ROSS, BANKS, MAY CRON
& CAVIN
Twentieth Floor, Coastal Tower
Nine Greenway Plaza
Houston, Texas 77046
(713) 626-1200

KAREN L. HEUER
Counsel of Record
8100 34th Avenue South
Minneapolis, Minnesota 55404
(612) 853-3050

Attorneys for Respondent